SUPREME COURT
FILED
OCT 17

IN THE

SUPREME COURT

OF THE UNITED STATES.

JAMES SPEARS *et al*, APPELLANTS,
vs.
JONATHAN K. GAPEN, THE BOARD OF TRUSTEES OF THE WABASH AND ERIE CANAL, APPELLEES. } No. 337.

APPELLANT'S BRIEF.

SHELLABARGER & WILSON,
HILL & NICHOL,
For Appellants.

Indianapolis Sentinel Co., Printers and Stationers.

Sentinel Company, Printers, Indianapolis, Ind. *January*, 1881.

IN THE

SUPREME COURT

OF THE UNITED STATES.

JAMES S. SPEARS *et al*, APPELLANTS,
vs.
JONATHAN K. GAPEN *et al*, APPELLEES. } No. 337.

Appeal from the Circuit Court of the United States for the District of Indiana.

IN CHANCERY.

APPELLANTS' BRIEF.

Statement of the Case.

On the 19th of November, 1874, the original complainant, Jonathan K. Gapen, filed a bill in said Circuit Court on behalf of himself and all persons or corporations who were the holders of canal stock issued by the State of Indiana, in the manner set out in said bill, against the Board of Trustees of the Wabash and Erie Canal. After a demurrer to this bill had been overruled an answer was filed admitting its main allegations, and in July, 1875, the cause was submitted on the bill and answer, and the court rendered a decree in favor of the complainant.

The facts presented by the bill and substantially admitted by the answer, are as follows: Prior to the year 1846 the State of Indiana had become largely in debt and for some years had been wholly unable to pay any part of the debt, either principal or interest. That pursuant to an act of the Legislature of that State, passed in 1846, entitled "An act to provide for the funding of the debt of the State "of Indiana, and for the completion of the Wabash and "Erie Canal," and an act supplementary to said last named act, passed by the Legislature in 1847, the said State entered into an arrangement with such of the holders of her bonds as accepted the provisions of said acts by which, on the surrender and cancellation of the bonds, then outstanding, she agreed to issue to these holders, in lieu of the bonds so held by them, certificates of stock for one-half of the principal, to be paid by the State in the manner and at the time named in said acts and also like certificates of stock for one-half of the interest then due, to be paid in like manner by the State, and for the remaining one-half of the principal and interest, the State agreed to issue certificates called, in the proceedings of the case, "Canal Stocks," being the stocks named in the bill of complaint; that these last named stocks should be a charge upon and be paid out of the income arising from the Wabash and Erie Canal, and its lands and funds, and that no other provision would be made by the State for the payment of said canal stock. The Wabash and Erie Canal was at that time by far the most important public work belonging to the State, extending as a continuous line from the Ohio State line southwest of Toledo to the Ohio river at Evansville, but the south half of it from Coal creek to the city of Evansville was in

an incompleted state, and would require a large outlay over and above the then resources of the State to complete it. These resources consisted of the proceeds of lands sold and unsold, which had been granted to the State by Congress to aid in the completion of the canal, and which, by the provisions of said acts, were to be transferred with it. To provide the additional funds required, the holders of the canal stocks, or such of them as chose to do so, were authorized to subscribe to a special fund to the amount of two million eight hnndred thousand dollars, and to receive certificates of stock for the amounts so subscribed by them, which would be preferred stock and the first lien upon the canal, its lands and income, and should be first paid out of the said funds, and those who should thus subscribe should be entitled to a preference for the payment of the other canal stocks held by them over those who failed or refused to subscribe.

To carry into effect this arrangement the Board of Trustees of the Wabash and Erie Canal, the defendants to said bill, were created a body politic and corporate, and by a deed duly executed by the State of Indiana, to said Trustees, the title to the Wabash and Erie Canal, finished and to be finished, and everything pertaining to it, and all the lands and lots which had been granted by the United States to the State of Indiana to aid in building and maintaining it, and the unpaid purchase money of such as had been sold and not yet paid for, became vested in the said Board of Trustees, in trust, to carry into effect the arrangement so entered into with said bondholders; which deed was delivered to the said trustees on the 30th day of July, 1847. And that from that time forward the said Trustees, as such

body politic and corporate, had possession and control of said property so conveyed, for the uses and trusts, and upon the conditions named in said deed, which were the same as those provided for in the acts of 1846 and 1847.

That out of the funds subscribed by the holders of the canal certificates and the sales of lands held by the trustees, the canal was finished so as to be capable of being used for navigation from Coal creek to the Ohio river at Evansville. But owing to a want of water-supply, caused in part by the hostility of the citizens of the State residing near certain reservoirs necessary for that purpose, and also on account of the completion of railroads built and operated under the authority of the State, said part of the canal did not remain for any length of time in a navigable condition; and as early as the year 1860 the navigation of all of the said canal south of Coal Creek was virtually abandoned, and has not been since resumed. And in the year 1859 the trustees reported to the Legislature of the State of Indiana their inability to maintain navigation on any part of the canal, having exhausted all of their funds applicable to that purpose; and so much of said canal as has been used for navigation since that time, has been by arrangements made by said trustees with companies and individuals, and which have not furnished any revenue or income to be applied to the payment of any of the "canal stocks," and at no time has it been in the power of the trustees to pay out of said trust estate and funds any part of any class of said certificates, not even the interest on the subscription made by the holders of said certificates to the fund in aid of the completion of said canal. And there is now no prospect of ever being able to make any payments on any of

said canal stocks out of any income to be derived from said canal, or any of the property so held by said trustees for that purpose; and the canal, its banks and works necessary to sustain it are becoming all the time less valuable, and must, unless kept up by the use of funds which the trustees have not the control of become wholly valueless.

By the acts of 1846 and 1847 it was provided that when the income arising from the canal and its dependencies should pay to the holders of said stock the sums that might be due them, then it should revert to the State, and she was to become reinvested with the title—and the State also reserved the right, after twenty years from the nineteenth day of January, 1846, to redeem said stock certificates by the payment of the principal and interest due on the same and to retake possession of the canal and its dependencies.

By an act of the General Assembly of the State, passed in 1857—the twenty years not then having expired—it was declared not to be the purpose of the State to exercise the right of redemption; and by an amendment to the constitution, adopted in 1873, the General Assembly is expressly prohibited from liquidating or assuming, in any manner or at any period, any portion of said canal stock, or taking control of said canal as a public work of the State. The main relief sought in the bill of complaint is the sale of the canal and its appurtenances and all the lands remaining, and that the proceeds of such sales be brought into court and divided between the holders of said stock, according to their rights and priorities.

Upon these facts the decree of the court was, among other things, that the holders of the different stocks speci-

fied in the bill were entitled to have the trust property appropriated to their benefit; the then existing Trustees of the Wabash and Erie Canal were continued trustees under the order of the court; Hon. Samuel Gookins was appointed special master to take the accounts of such trustees, and to take proofs of the amount of stock outstanding and by whom held, etc., and to report the same to the court for the purpose of settling the equities of the scrip holders upon the trust property

On December 24, 1875, the special master and the trustees made their reports, and the court ordered a sale of the canal, "including its banks, margins, towpaths, side-"cuts, feeders, basins, rights of way, locks, dams, water-"powers and structures, together with all its appurtenances; "also all lands and lots now belonging to the trust and "vested in the Board of Trustees of the Wabash and Erie "Canal, and franchises, except as hereinafter specified," in certain specified divisions.

On March 23, 1876, the special master and resident trustee reported a sale of all that part of the canal, etc., running east from the west boundary of Lafayette to the Ohio State line, to Jonathan K. Gapen for $85,500, which was confirmed.

On June 6, 1876, said master and resident trustee made a further report, showing the assignment by Gapen to William Flemming, of his bid, and the execution of a deed to Flemming for the property.

On February 12, 1877, among other things, Hon. S. B. Gookins was appointed the receiver, "to take, receive and

"hold the moneys, assets and property of said trust, and to "complete the full and final settlement thereof, and distri- "bution of the profits thereof," under the orders of the court.

On the 7th of July, 1877, the appellants, Spears *et al.*, filed their cross-bill against the original plaintiff and defendants, Samuel B. Gookins, receiver, and other parties therein named, charging in substance that by an act of the Legislature of Indiana, approved January 20, 1842, certain provisions were made. The substance of the entire act is fully set out, and for convenience, we here copy it:

AN ACT RELATIVE TO WATER POWER AT THE TOWN OF DELPHI, CARROLL COUNTY.

[APPROVED JANUARY 20, 1842.]

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That it shall be the duty of the engineer or other person having charge of the Wabash and Erie Canal on or before the first day of May next, to let by contract to the lowest bidder, the clearing out and removing all obstructions from the bayou which extends from the canal, at the said town, to the Wabash river, *for the purpose of creating water-power upon the said canal at that place.*

SEC. 2. *Be it further enacted* that said engineer or other person, before letting the said work, shall give public notice of the terms, conditions, and also the time of the said letting, by publishing the same in the newspapers printed in the said county, for two months, at least, previous to the

time of said letting. *Provided*, that the said works shall be finished within six months from the time of said letting.

SEC. 3. *Be it further enacted* that the said engineer, or person having charge of that part of the canal, shall cause the work to be estimated when the same is completed, and shall give to the person doing the same a draft or other evidence of indebtedness, specifying what the same was given for, and the amount due him as by the said contract, *and for the purpose of paying for the said work, the rents that may be received by the State for water power created by this act shall be appropriated for that purpose, and to no other purpose;* and the person or persons doing the said work shall look to the said rents for their pay, and to no other source whatever; and as fast as the said rents may be due or received, they shall be expended in paying for the said work until the whole amount is paid.

SEC. 4. *Be it further enacted* that so soon as the said work is let to some responsible person, it shall be the duty of the said engineer, or other person, to lease out a portion of the water-power by this act created, not exceeding in all what would be sufficient to propel thirty run of stones, at the same prices and upon the same terms and conditions as water-power under similar advantages is leased at other places upon the said canal, and it is made the duty of the said engineer, or other person, before leasing the same, to give at least two months notice of the time, terms, and conditions upon which the same will be leased, in the newspapers published in the said county.

SEC. 5. *Be it further enacted* that it shall be the duty of the said engineer, or other person, as the agent on behalf of

the State, for the purpose of securing to the State the advantages by this act contemplated, to purchase of the owner or owners of land lying adjacent to the place where said water-power is to be located, such real estate, not exceeding in all four acres, as may be necessary to carry into effect the provisions of this act, at such reasonable prices as may be agreed upon by the said agent and the owner or owners thereof; and in case of disagreement, at such prices as may be fixed by persons chosen by the said agent and the said owners: *Provided*, that in no case shall the prices paid by the State for such land exceed what has heretofore been paid for such property under the same or similar advantages, and for such real estate so purchased, the said agent shall take a conveyance to the State by deed in fee simple: *And provided further*, that nothing in this act contained shall be so construed as to authorize any interference whatever with the navigation of said canal.

SEC. 6. *Be it further enacted* that this law shall be in force from and after its passage.

That pursuant to the provisions of said act, Stearns Fisher, the engineer of said canal, as agent of the State of Indiana, entered into a contract with James Spears and Reed Case, to construct said works as provided for by said act, and in accordance with plans, etc., agreed upon; that Spears & Case completed said work within the time prescribed by said act, and in strict accordance with said terms, etc.

That on January 19, 1846, another act was passed by the Indiana Legislature, and approved by the Governor, the

substance of which is set out, but which we here, for convenience, copy entire:

AN ACT AUTHORIZING A SETTLEMENT WITH SPEARS & CASE FOR WORK DONE ON THE SIDE CUT AT DELPHI, IN CARROLL COUNTY.

[APPROVED JANUARY 19, 1846]

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That it shall be the duty of the officer having charge of the Wabash and Erie Canal, east of Tippecanoe, as soon as possible, to make a settlement with Spears & Case for work done by them under an act entitled "An act relative to water-power at the town of Delphi, Carroll county," approved January 20, 1842, and to give to said Spears & Case a certificate for the amount of work done by them under said act, which shall be paid out of the rents derived from the water-power created by the said cut constructed by said Spears & Case near said town, and the said certificate shall draw six per cent. interest from the time the contract was completed by said Spears & Case, until payment thereof shall be made.

SEC. 2. This act to be in force from and after its passage.

(Local Laws of 1846, page 364.)

That on the 29th of September, 1847, Stearns Fisher, general superintendent of the Wabash and Erie Canal, made an estimate of the work done by Spears & Case, under said act, and gave them a certificate that it was worth $10,354 20, to draw interest at six per cent. from December 1, 1843, until paid. A copy of said certificate is here re-

ferred to as exhibit A, but in the printed record, it appears at the end of exhibit A, on page 45, and for convenience we insert it here:

DELPHI, Sep. 29, 1847.

I hereby certify that Spears & Case have performed work to the value of ten thousand three hundred and fifty four $\frac{20}{100}$ dollars in cleaning out the bayou which extends from the canal at Delphi to the Wabash river, estimating according to the terms of a contract between said Spears & Case and S. Fisher, commissioner of the W. and E. Canal, dated May 1, 1842, made in pursuance of an act entitled "An act relative to water-power at the town of Delphi, in "Carroll county, approved January 20, 1842." And according to the provisions of an act entitled "An act "authorizing a settlement with Spears & Case for work "done on the side cut at Delphi, in Carroll county, ap- "proved January 19, 1846," the said Spears & Case are entitled to receive interest on said sum until paid. And I certify also that said work was performed prior to the first day of December, 1843.

S. FISHER,
Gen'l Sup't W. and E. Canal.

That on May 29, 1846, said Stearns Fisher, as such superintendent, made a contract with George Robertson for the use of a sufficient water power to propel three run of stones, a copy of which is filed and referred to as Exhibit B.

That Ebart Rhienhart (one of the defendants to the cross-bill), is the present assignee and lessee of said run of stone; that on July 5, 1852, Thomas Dowling, resident

trustee, acting for and on behalf of the Board of Trustees of the Wabash and Erie Canal, executed to James Spears, Reed Case and James P. Dugan, a lease for the term of thirty years from November 1, 1852, of sufficient water to propel three run of stone, a copy of which is filed as Exhibit C (in the printed record, this contract is set out on pages 34, 35, 36, 37 and 38, as Exhibit A); that Abner H. Bowen (one of the defendants to the cross bill), is the present assignee and lessee of said run of stone; that said lessees and their assignees have, from said time to the present, and still occupied, used and enjoyed said water-power under said leases; that the rents derived under said leases have been paid to Spears & Case down to November 1, 1875, the total received being $18,871.75, as shown by Exhibit D. (See printed record, from pages 38 to 45, inclusive, which also shows the amount still due, $24,678.86.)

The cross bill then proceeds to state the transfer of the canal, etc., by the State to the trustees, under the acts of January 19, 1846, and January 27, 1847, and the proceedings in the original cause down to and including the deed to Flemming herein before fully set out, and then charges that the part of said canal, so lying between Logansport and Lafayette, which includes the Delphi water-power, has since been sold by Flemming to the defendants, E. H. Shirk, H. J. Shirk, W. N. Dukes, T. J. Immel, W. Dolan, J. W. Dritt and C. B. Knowlton, who are in possession, and claim that by virtue of said purchase, they are entitled to the rents of the Delphi water-power; that said Reed Case died October 23, 1871, leaving a widow and children as named; that administration was granted on his estate, and the estate fully settled, and debts paid, and adminis-

trator discharged; that the interest of said Case in said contract with the State was not included in the settlement of his estate, but descended to his widow and heirs aforesaid; that said Spears and the representatives of said Case have repeatedly demanded from the lessees of said water-power at Delphi, payment of rent from November 1, 1875, which they refuse, upon the ground that the purchasers of the canal claim to be entitled thereto; that there is due from said Rhienhart for the use of said water, from November 1, 1875, to May 1, 1877, $555.08; that said Gookins, receiver, has in his possession the sum of $——— derived from the sale of said canal and lands, a part of which resulted from the sale of said water-power at Delphi; that said water-power created, as aforesaid, was of sufficient capacity to propel thirty run of stones, but the persons in charge thereof only rented sufficient for six run, as above described; that frequent applications were made to Dowling, the resident trustee, for further runs thereof, which were refused on the alleged ground, that the water was required at Lafayette; that by reason of such refusal, said contractors were prevented from receiving the sum due them, as shown by said certificate.

Wherefore it was prayed that defendants should be required to answer; and upon final hearing a decree was asked that the sum found due plaintiffs be paid by said Gookins out of funds in his hands as receiver; or if the court is of opinion they are not entitled to this relief, they pray for a decree giving them all sums due for rents of the water-power, or that may accrue after May 1, 1877; for the appointment of a receiver to take charge of said water-power, collect the rents, and apply them to the payment

of plaintiffs' claim, until fully paid with authority to make additional leases for not exceeding thirty run of stone; that the owners of said canal from Logansport to Lafayette be required to keep the same, and dam, locks, etc., in good condition; to preserve and maintain said water-power at Delphi, and that the receiver be required to compel the lessees of said water-power to perform the stipulations of their leases as to repairs, and for general relief.

To this cross-bill separate demurrers were filed by Gookins, receiver; by Shirk, *et al.*, the purchasers and owners of the part of the canal on which the water-power is located; by the board of trustees of the canal, and by Gapen; and the ground of demurrer assigned in each case, except the demurrer of Gookins, was, 1st, want of jurisdiction of the subject matter, or the person of defendant, and, 2nd (which was the sole ground of Gookins' demurrer), want of equity.

The two errors assigned, are:

First—That the court below erred in sustaining the several demurrers of the appellees to the intervening petition and bill of the appellants.

Second—The court below erred in holding that there was no equity in the intervening bill and petition of the appellants, and in dismissing the said bill for the want of equity.

ARGUMENT.

I. *As to Appellants' Interest in the Fund Derived from the Sale of the Canal Property.*

Whatever rights Spears & Case had, arose under the act of January 20, 1842, through their contract with the State, and their work done pursuant thereto, which was all completed as shown by the certificate of Stearns Fisher, the State's agent to make settlement, before December 1, 1843. On the same day when the act familiarly known in Indiana as the "Butler Bill," was approved, viz., January 19, 1846, an act was also approved entitled "An act authorizing a settlement with Spears & Case for work done on the side cut in Delphi, in Carroll county." These acts are in a certain sense *in pari materia* and must be construed together.

Probably no act of the Legislature was necessary to authorize the settlement provided for by this act, as it would seem that the third section of the act of January, 1842, *supra*, gave ample authority therefor, but the passage of the act, especially under such circumstances, on the day of the passage of the Butler bill, was a fresh recognition and reaffirmance of the rights of Spears & Case, and a most public notice to all parties interested in, or claiming under, the Butler bill, of those rights.

These rights so far from being infringed, or from any attempt being made to impair them, by the Butler bill, were specially recognized and protected by it. By the eighth

gage, a Welch mortgage, a *vadium vivium*, or to what particular class of securities it might belong. A legal metaphysician might indulge in lengthy speculations upon that subject, and end with no increased light upon the vital questions before this Court, viz., what are the rights of these parties in relation to this property? The plain language of the act of 1842, above quoted, is: "*And for "the purpose of paying for said work, the rents that may be "received by the State, for water-power created by this act, "shall be appropriated for that purpose, and to no other pur-"pose;* and the person or persons doing the said work "shall look to the said rents for their pay, and to no other "source whatever, and as fast as said rents may be due or "received, *they shall be expended in paying for the said work "until the whole amount is paid.*"

No stronger language could possibly have been used to express the clear intention of the Legislature that whoever should invest their money and labor in doing the proposed work should have the rents and profits arising from it for their compensation; and that such rents and profits were, and forever should be, exclusively devoted to the payment of the debt so to be incurred. This was the language of a sovereign State, making a proposal which, when accepted and complied with, should become a binding contract upon her. There is no obscurity in this expression of intention of this high contracting party; and that it might never be truthfully said that the State was creating and baiting a trap, whereby it might obtain the labor and money of the party who might do this work, with no security that any rents and profits would ever arise from the water-power

created whereby payment could be made, the Legislature immediately follows the provision above quoted with an imperative direction to the agent of State in charge of the work to lease the water-power to the extent of not exceeding thirty run of stone, and to the purchase of not exceeding four acres of ground in connection with said water-power to make it available.

When this proposal was made by the State, and accepted and acted upon by Spears & Case, and the work required by the State fully performed by them, it became more than a mere pledge, a mortgage, or a lien. It was an *absolute grant*, for a consideration received, of all the rents and profits which might thereafter arise from this water-power, not to exceed thirty run of stone, limited only by the requirement that the navigation of the canal should not be interfered with, and a direction to the agent to collect those rents and pay them to Spears & Case in satisfaction of their claims for this work.

No legislative appropriation for the payment of these revenues was needed to authorize the agent in charge of the work, and who received the rents, to pay them over to Spears & Case. These rents did not need to go into the treasury at all. The principles of the cases of *Ristine* v. *The State*, 20 Ind., 328, and *State* v. *Ristine*, *id.* 345, upon this subject do not apply.

Suppose this contract had been made between individuals standing upon an equal footing, with power in Spears & Case to obtain redress against the other party for any failure to comply with its terms, can it be doubted for a

moment that a court of equity would, upon a proper showing, have decreed in their favor a specific performance of the stipulation to pay in the manner described?

The State could not be sued, like an individual, to enforce this contract, or for its breach; but the State can no more pass a law impairing the obligation of its own contract than it can impairing the contract of other parties. Whatever legislation the State enacted for the purpose of transferring to any one else the canal property, could in no respect whatever impair the rights of Spears & Case, or appellants, or in any respect change them to their prejudice from what they would be independent of such transfer.

And so the trustees to whom the transfer from the State was made evidently understood the effect of the transfer, as they continued to pay these rents, as the bill shows, down to the time when the canal property was sold under the decree in the original case.

When the original suit was brought by Gapen, the original complainant, as a holder of the canal stock issued under the acts of 1846 and 1847, on behalf of himself and other such stock holders, it was only to enforce such rights as were conferred upon them by that legislation. Independent of that they had no rights whatever against this canal property. They received their stock, on which alone any right was predicated in the original bill, solely under those acts. Those acts explicitly defined the trusts upon which the canal property was conveyed to the canal trustees. The eighth section of the act of 1846 specifies upon what trusts and to what uses the property directed to be

conveyed by the Governor's deed, which included every thing connected with the canal, was to be held by the trustees to whom it was to be conveyed. These were: First—The proceeds of the lands donated by the General Government, to aid in the construction of the canal, sold and unsold, were to be applied to the repayment of sums advanced for the completion of the canal, and for work, etc., in the further prosecution of the work; and, Second—The balance of the proceeds of such lands and the *tolls* and *revenues* of said canal, up to January 1, 1853, after defraying all needful expenditures for repairs, etc., were to be applied:

1st. To the payment of interest on sums advanced for the completion of the canal to Evansville, and the remainder to pay the balance of the principal of such sums.

2d. To pay to subscribers advancing said sums two and one-half per cent. interest on the principal of the bonds they surrendered.

3d. To pay in full the interest at five per cent. on the special stock for arrearages and accruing interest charged over against the canal, and to pay the principal of said stock.

4th. To pay in full any other holder of any certificate of stock authorized by this act, interest at two and one-half per cent. on the amount of principal thereof.

5th. To pay into the State Treasury any remaining balance to be applied by the State to the redemption of outstanding stocks created by this act.

Provided, "That if the tolls and revenues of said canal "shall be insufficient for all the purposes aforesaid, then "they shall be applied, *pro rata*, among the respective "parties entitled thereto, first paying in full those entitled, "and so on *toties quoties*."

After 1853, the tolls and revenues of that part of the canal between Lafayette and the Ohio State line were to be kept separate from those derived from the residue of the canal, and after defraying certain expenses were to be first applied to make the full interest of five per cent. on certificates of stock to be issued for the outstanding Wabash and Erie Canal bonds, or if insufficient *pro rata* thereon; and if more than sufficient the *surplus to be added to the tolls and revenues to be derived from that part of the canal between Lafayette and Evansville, and the same to be applied as the said act before provided.*

The 10th section of the act gives the trustees full authority to sell and convey the lands donated by the general government, and to receive the proceeds of such sales, and all tolls and revenues arising from the canal.

The 12th section provides for terminating the trust "Whenever the moneys advanced for the completion of "said canal, with the interest and the special stock afore- "said, shall have been paid and refunded, and the State "shall have taken up and retired one-half of the stock "issued by virtue of the first section of this act, and shall "assume the payment of interest at the rate of five per "centum per annum on the balance, which the State "reserves the right of doing at its pleasure."

Throughout the entire act of January 19, 1846, there is no pretense of an authority conferred upon the trustees to *sell the canal*, of their own volition, in any event, or authorizing hostile proceedings against them for the purpose of obtaining such sale by order of any judicial tribunal, but the evident intention of the Legislature was that the property in the canal itself was to remain in the hands of the trustees, or be returned to the State upon the contingencies provided for.

In the thirty-second section it is provided, among other things, that the stock shall be "paid and redeemed, and *only* paid and redeemed, *out of said canal land, and the tolls and revenues of said canal*, as provided in the eighth section of this act;" and further, that as to the half of the principal and interest represented by this stock "the "holders of said certificates shall look *solely* and *exclu-* "*sively* to said canal lands and the tolls and revenues of "said canal, as provided in the eighth section aforesaid "of this act."

In the first section of the act of January 27, 1847, after providing for the remainder of the outstanding bonds of the State in accordance with the option reserved by the State by the thirty-second section of the act of January 19, 1846, and the issue of two certificates, each for an equal moiety of the principal of such surrendered bond, to bear interest at five per cent. after January 1, 1847, one of which certificates should be paid out of the revenues of the State, it is provided that the other certificate, with the interest thereon, shall be paid out of the canal lands, "and the tolls

"and revenues of the said canal," as provided by said thirty-second section.

Throughout this entire act the idea is prominently kept to the front that the *donated lands* and the *tolls* and *revenues of the canal* are the *sole means* thereby provided for the payment of the one moiety of the bonds, for which certificates were to be issued.

It can not be contended, therefore, that either the act of 1846 or 1847, in terms, or by legitimate construction, authorized the sale of the canal itself to satisfy the indebtedness evidenced by those certificates. Whatever power existed in the court below to decree such sale was by virtue of the principles of *general equity*. The money of the holders of this stock had gone into the creation of this trust property, which, from unforeseen causes, had turned out not to yield the anticipated revenue, and to afford no means from its revenues alone to pay the debt, and discharge the trust that had been charged upon them. There arose under the general principles of equity, a right in the stockholders to have their debt paid out of the property which their money had created. It was a property useless to any one in the condition in which the legislation of the State had left it. By the act of 1857 the State had renounced all intention of redeeming the canal, but had made no further provision to enable those who had invested their money in its construction to be reimbursed otherwise than by its tolls and revenues. By the constitutional amendment of 1873, the State had probibited its Legislature from paying any certificates payable exclusively

from the proceeds of the canal lands and the tolls and revenues of the canal (1 R. S. of 1876, 40, sec. 7); but still no provision was made, or had been up to the commencement of this suit, to make the canal itself, and property belonging thereto, available towards paying the debt for its construction.

Under such circumstances the ordinary principles of equity attach with more than ordinary force to the claim of the stockholders to have the property, which their money has created, used to satisfy their debt incurred in its creation. Here was an unproductive property, cast off and repudiated by the State, constantly depreciating in value, with no possibility of ever furnishing the tolls and revenues to which these creditors were to look for their pay, and with no possibility of ever satisfying any portion of their claims but by its sale. Tied up as it was by the legislation of 1846 and 1847, and the acts of the parties interested pursuant thereto, the naked question presented to a court of equity in the suit brought by the stockholders is: Shall the terms of this legislation and these contracts be adhered to, and this property be suffered to go utterly to decay, doing no good to any one, or shall it be taken charge of by the Court, and made available as far as possible toward payment of these just claims incurred in its creation? The mere statement of this question carries with it, in a court of equity, its own answer. The State, the creator of the trust, has repudiated all interest in it, or responsibility for it by the solemnity of a constitutional amendment. The *cestuies qui trust*, the stockholders, are the only parties to that legislation having interests to be

protected. It is simply just, *ex aequo et bono*, that their rights should be protected as far as they can be without prejudice to the rights of others. The State having no rights, the only parties other than the stockholders interested are those whose rights have been expressly secured by the clause above quoted from the eighth section of the act of 1846, and which we here again quote, as follows, viz.: "*Subject nevertheless to all existing rights and equities against the State on account of the same, or any part thereof, or liabilities of the State growing out of or in relation thereto.*

Here most forcibly comes in the application of the equitable maxim that "he who seeks equity must do equity" As we have abundantly shown, the complainants in the original bill stand alone in a court or equity upon their right to compensation out of the fund of property which their money has created. But four years before this legislation of 1846 and 1847, which gave them any rights whatever against the canal property, and when they held simply the bonds of the State, payable only out of the general revenues of the State, the appellants in this intervening petition had expended their money and labor in creating a part of the very property that the original complainants ask, and have obtained, a decree to have sold to satisfy their debt. True, appellants were to be paid solely out of the rents of the water-power created, just as the original complainants were to be paid solely from the proceeds of the sale of the canal lands, and the tolls and revenues of the canal, but in each case there has been the same failure of the means provided to yield the necessary revenue. Notwithstanding all payments, the interest

on the sum due Spears & Case has gone on steadily increasing until from $10,354.20, the original amount due, it has arisen to $24,678.84, as shown by the account attached to the intervening petition. The money and labor of Spears & Case created the water-power at Delphi, just as the money of the stockholders created the main line of the canal. The means provided for their payment, and to which they were to look exclusively, have failed as signally and utterly as the means provided for the payment of the stockholders, and to which they were to look exclusively. Both stand in that respect upon precisely the same equity. No equitable principle exists upon which the entire proceeds of the sale of both the water-power and the canal can be appropriated to the payment of the stockholders, no part of whose money went into the water-power, while those whose money and labor created the water-power are to be turned out of court without a farthing.

Especially is this the case where, as here, appellants have the older equity. We think the legal maxim *qui prior est tempore, potior est jure,* applies here with peculiar force. Nor is it any answer to this proposition that it would be difficult to ascertain with precision the relative rights of the stockholders and appellants. The principle governing the voluntary wrongful admixture of goods as against the wrong doer, does not apply here, and the fact that the dividing line between the interest of appellants and the interests of the stockholders in the fund arising from the sale of the canal property can not be certainly drawn with precise accuracy, furnishes no reason why the

entire right of appellants shall be wiped out and their property or interest be bestowed in a body upon the stockholders. Yet there is no other ground upon which the action of the court below sustaining the demurrer of Gapen, the original complainant, and dismissing the intervening petition of these appellants for want of equity, can be sustained. If appellants have any rights at all to any part of the funds arising from the sale of the canal property, then was eminently the time, and the court below, the forum, when and where those rights should be asserted, while those funds were under the control of that court. Some *approximation* at least can be made towards determining the relative rights of appellants and the stockholders in the funds derived from the sale of the canal property, so that appellants can secure *something* for the property which their money and labor has created. By the ordinary reference to a master to take testimony, the relative rights of these parties in the fund can be as closely ascertained as in similar cases daily arising in courts of equity which are so referred. But to obtain anything at all they must have a standing in court as intervening creditors, which the action of the court has denied them. As to these funds in the hands of the court, they are practically told by the court below that they have no rights whatever, and there is no other court where their rights can be asserted.

In the argument of the demurrer below, the case of *Clendenin* v. *Frazier*, 1 Ind. 553, was referred to as being very analagous to the case at bar.

We confess our inability to see the analogy. In that case certain certificates had been issued to Clendenin under an

act of the Legislature which provided that they should be paid out of tolls of the New Albany and Vincennes road not otherwise appropriated. Frazier was merely the superintendent of the road. Clendenin brought his bill in chancery against Frazier to compel payment of the certificates. The complete defense to this suit was that the defendant was an agent only of the State which issued the certificates, and hence no liability existed against him on the promise, and upon this ground the court decided the case. True, the court said it did not think the clause pledging the tolls could operate as a pledge, because, first, the tolls had not then accrued; and, second, the debts to be paid out of them did not exist. But all this was mere *obiter*, and in conflict with the later and more enlightened views of this Court and the Supreme Court of Indiana. *Butt* v. *Ellet*, 19 Wall 544; *Hendrick* v. *Bratton*, 63 Ind. 438.

The case of *Fishback* v. *Woodruff*, 51 Ind. 102, was also relied upon. In that case the State built the Central Canal, and in 1840, by its canal commissioner, leased to one West "so much surplus water not required for the purpose of navigation" as would propel certain machinery for certain rent reserved. The State sold the canal and the purchaser cut off the water. The prayer was that he should be compelled to furnish the supply of water contracted for by the lease from the State. It was held by the court that the canal commissioner, who had made the lease, was the mere agent of the State, and known by all persons to be such; that the leasing of the water-power was a mere incident to the canal and not the purpose of its creation;

and that the lessee took this lease subject to all the vicissitudes of dilapidation, destruction and abandonment, and that as rent accrued from time to time for water furnished the only penalty the State would at any time incur would be a loss of rent. We do not see how this case bears upon the one at bar. That was a lease of an existing water-power upon a rent reserved, creating the ordinary relation of landlord and tenant only, upon the most favorable construction of the contract; the water to be taken from the surplus over the requirements of navigation. Here the Legislature proposed to clear out the bayou from the canal to the Wabash river, "*for the purpose of creating a water-power*" (acts of 1842, page 35), the necessary labor of its creation to be paid for out of the rents of the water-power, not exceeding thirty run of stone. There the supply of water was cut off by the landlord. Here the power still exists and the supply is abundant. Much was said below about there being no liability upon the State or the owners of the canal to keep up the water-power. It will be quite soon enough to discuss the question of that liability when it arises. It has not arisen yet. It will be better to decide this case upon the questions actually arising in it than to go outside and discuss questions that do not belong to it.

We respectfully submit that the action of the court below in turning these appellants out of court and refusing them participation in this fund, can not be sustained on principle or authority.

II. *As to Appellants' Rights as against the Purchasers of the Canal Property.*

But if the Court should be of opinion that the appellants have no rights whatever in or to any part of the fund arising from the sale of the canal property, and that the decision of the court below sustaining the demurrer of Gapen was right, then we insist that the appellants have the right to the rents and revenues received from the Delphi water-power, or which that water-power may be made capable of yielding, to the extent of thirty run of stone, notwithstanding the sale of that water-power with the rest of the canal property; and that said sale can not in the slightest degree affect their right to such rents and revenues; and that as such purchasers are before the court below for all purposes connected with the proper administration of the trust property which the court has ordered sold, the rights of appellants as to the property can be fully adjusted, and if, as we contend, they have an interest in the said property adverse to the interests of the purchasers, those interests can be fully protected.' (Rorer on Jud. Sales, 69, Sec. 148, and authorities cited.)

The State has never undertaken to repudiate the contract with Spears & Case, but by the clause which we have twice above quoted from section eight of the act of 1846, has most scrupulously and solemnly guarded it from violation.

That all subsequent grantees of the property take it with only the rights which the State had, and subject to all equities against the State, is a proposition so palpable that it is

unnecessary in this court to discuss it or cite authorities in support of it.

As we have above shown, the contract between the State and Spears & Case, under which this water-power was created, was not a lease, a mortgage or a pledge, but a *specific grant*—a special appropriation of this property to the particular purpose of paying this debt. Stripped of all technical ideas and arbitrary rules, which tend more to darken and confuse than to illustrate the questions in the case, the simple proposition of the State was: "Clean out this bayou, and create a water-power, not for navigation, nor to aid navigation, of the canal, but to create a valuable property in connection with the canal, where nothing of value now exists, and you shall have the rents and profits of the property created, to the extent of thirty run of stone, until you are fully paid."

No Butler bill was then in contemplation, nor were any rights conferred by such bill until four years afterward, when appellants' money had all been invested and the property created.

Now, is it the law, that these stockholders, whose rights against the canal had no existence until four years after this contract was made, and long after the rights of Spears & Case had become complete by the full performance of their contract, can obtain a footing in a court of equity whereby they can utterly extinguish the rights of Spears & Case in this property, and that even without making them parties and giving them a day in court?

We confess that such a proposition is abhorrent to all our ideas of the principles and practices of courts of equity, and we do not think authorities will be found to sustain it.

In the argument below, counsel for the purchasers filed a printed brief, in which a number of authorities were referred to, and extensive quotations copied therefrom. We presume the same authorities will be relied on here, and we will therefore review them now.

The case of *West* v. *Townsend*, 12 Ind. 434, was a sale by an administrator, pursuant to statutes, which expressly authorized an order of the court, upon proper application, to sell real estate of a decedent to satisfy liens created in his lifetime, and did not rest at all upon the general doctrines applicable to judicial sales independent of statutes. In that case the court say that the statute authorized the sale of real estate, *subject* to existing liens, or to *discharge* existing liens, or it might combine both, *as it did in that case*, and the sale for the purpose of discharging liens related back to the date of the oldest lien, and gave the purchaser a title as upon a sheriffs' sale to satisfy that lien. There is something in that case analagous to this.

The case of the *Steamboat Rover* v. *Stiles*, 5 Blackf. 483, was a case where Stiles sought to enforce a claim against the boat, for services, under an act of the Indiana Legislature. It was decided upon principles peculiar to maritime law, which do not apply here.

The case of *Wiswall* v. *Sampson*, 14 Howard 52, was also relied upon. We are unable to discover from the whole scope of the opinion in that case anything supporting appellees' position, that the water power in question is released in the hands of the purchasers from the claim of appellants. The only points decided in that case were, first, that where real estate is in the hands of a receiver, appointed by a court of equity, a sale of that real estate, upon execution issued on a judgment at law, is a nullity; and, second, that if such judgment creditor applies to the court of equity, after making his levy, and asks that effect be allowed to his title, and the court adjudges his title invalid, this is *res adjudicata*.

The entire drift of the opinion is to the effect, that, where property, or a fund, is taken possession of by a court of equity, that court will be scrupulously careful to preserve the rights of all parties interested in the fund, or property, in the order of their priority, and will never assume to affect those rights without having the party interested in some way before it. The following paragraph from the opinion shows its entire character:

"We agree, that the person holding the prior legal lien or encumbrances must have notice of, and an opportunity to come in and claim his prior right to the property, or interest in the fund, before his legal right can be affected; and the proper way is by summons or notice, upon the order or direction of the court."

Surely there is nothing in this language that would give color of sanction to appellees' theory, that, by the decree

in the original action, without notice or knowledge of its pendency, all rights or claims of appellants in the canal or water power property can be extinguished.

The court, in the case last cited, says further: "We do not doubt but that it would be competent for the court, in case the judgment creditor holding the prior lien had not come in and claimed his interest in the equity suit, to decree a sale in the final disposition of the fund subject to his judgment. *The purchaser would then be bound to pay it off.*"

In their brief below, counsel for the purchasers, in speaking of this case, say: "The case of *Wiswall* v. *Sampson*, 14 Howard 52, establishes a principle exactly applicable to the case at bar. * * * The opinion of the court amounts almost to a treatise on the law and practice in cases of this class."

We are entirely content to rest this case upon the principles we have quoted from the opinion in that.

The case of the *Steamboat Raritan* v. *Smith*, 10 Mo. 527, was also referred to. In this case the principles of the maratime law, in connection with the Missouri statutes, were applied, and the case throws no light whatever on the case at bar. By the maritime law, in cases of this character, "all the world are parties," and are presumed to be before the court and assert their rights. *Florentine* v. *Barton*, 2 Wall. 216; *Beauregard* v. *The City of New Orleans*, 18 Howard, 503; *Grignor's Lessee* v. *Astor*, 2 How. 338.

Moore v. *Shultz*, 13 Penn. St. 98, was a sale of real estate, by order of the Orphans' Court of Pennsylvania, on

petition of the administrator, who, in his schedule of debts to be paid out of the proceeds of the real estate, included the mortgage in controversy, and, in his report of distribution of the proceeds, gave the same priority to the mortgage debt as the mortgage held upon the land. The court held that this mode of distribution was proper, and that the sale extinguished the lien of the mortgage. In the course of its opinion the court says: "Liens, the extent or amount of which can not be rendered certain, *are not divested because they could not be made out of the amount produced by the sale*. And liens expressly created by act of assembly (such as the interest of the widow in one-third of the valuation of the land taken by the heir at the appraisement, and the lien or interest of the heirs for that third at the death of the widow) are not divested, because, by the terms of the act the lien continues, into whose hands soever the land may go, until it is paid; and, as it can not, from its very nature, be paid out of the purchase money, the lien must remain."

If the rights of Spears & Case were a mere lien, and not, as we contend they were, an absolute grant and appropriation of the rents of the water power stipulated for, they were a lien created by statute, and the reasoning of the Pennsylvania court above quoted applies with quite as much force in appellants' favor as to the cases referred to therein.

This entire opinion is to the effect, that, where all parties interested in liens upon, or claims against, the property in litigation, are brought before the court, in some mode known to the law, so that they have an opportunity to be heard in

support of their claims, and their rights can be protected and their liens or claims are of that character which can be extinguished by a judicial sale, such sale will extinguish them; and their liens or claims will be transferred to the fund arising from the sale; otherwise, they survive against the property in the hands of the purchaser. And this appears to be the only reasonable, as well as the well settled rule in cases of this character. *Rorer on Judicial Sales*, 94, Sec. 216 and 217; *Id.*, 222 and 223. It would be monstrous for a court of equity to assume to determine the nature, extent and amount of a party's claim, without permitting him to come before it.

The case of *Girard Life Insurance Company*, 57 Penn St. 388, was also referred to. In that case the court held that, in a partition proceeding, where the real estate could not be divided, and a sale was ordered, the liens on the land were transferred from it to the fund.

DeViner v. *Blackstone*, 6 Blatch. 235, was a case where certain holders of mechanics' liens, against property in the hands of a receiver appointed by a court of equity, sought to enforce them. The receiver brought a bill against them to require them to release their lien and look to the fund, and it was so ordered, in accordance with well settled equity principles.

The foregoing are all the authorities referred to by counsel for the purchaser of the canal in the court below. We respectfully submit that not one of them even tends to support the principle upon which alone the decision of the court below, sustaining the demurrer of the purchasers of

the canal to the intervening petition of appellants, can be made to rest, viz: That the rights of appellants in, or to, or against, the Delphi water power, can be entirely divested from the canal property and this water power, and it be sold by the order of court, free and clear of all such claims, without the appellants being in any manner before the court, or having an opportunity to be heard in regard to their rights. In appointing a receiver for property, one of the ordinary things first to be done, after such appointment, is to ascertain who are interested, and the relative priority of claims, and so to administer the property or funds as not to prejudice the rights of any one. 3 Daniel's Ch. Pr. 1978.

It is idle to talk of any claim against the State in favor of appellants. Neither Spears & Case or appellants ever had any claim payable out of the general revenues of the State, or in regard to which any right existed against the State, except simply to have the rents for not exceeding thirty runs of stones, collected by the State and paid over to them. And when the State divested herself of all power to lease or collect rents for this water power, by the transfer of the canal and the water power to the trustees, even that claim against the State ceased and immediately attached to the trustees, and, as the record shows, was recognized and carried into effect by them.

The act of 1842, authorizing the contract to do this work, and the subsequent acts making provision for settling and paying the claim, all being public acts, and notice to the world, the continuous application of the proceeds of

the leases of the Delphi water power to the payment of this debt, ever since it began to be leased, were certainly matters that would at least put the purchasers of the canal property on inquiry, and they can hardly claim to be innocent purchasers as to the claims of Spears & Case. There was no presumption of payment of the claims from lapse of time.

Neither the State or the trustees of the canal owed Spears & Case a duty in respect to the canal or water-power, in the nature of a personal obligation, but previous to the transfer the State simply undertook to act as trustee for the leasing and collecting of the rents of the water-power, and paying them over to Spears & Case; and after the transfer this trust devolved upon the canal trustees.

The appellants in this case, with their rights originating in an act so solemn and notorious as a public statute of the State, by its mere existence notice to all the world, were not only not made parties to the original suit but when they knocked for admission into the forum where their rights were being extinguished, that they might be heard for their protection, its doors were closed and bolted against them, and they were told that they had no rights which that court was bound to respect.

There is no magic in the phrase "*judicial sale.*" It is one of the means resorted to to enforce and protect rights, and not to extinguish and destroy them. From all the authorities cited below by the appellees' counsel, and reviewed herein, it can not but be apparent, that whenever a judicial sale is ordered, it is only after scrupulous care has been taken to protect the rights of all parties interested in the property to be

sold, and by providing that whatever rights exist against the property itself shall either he preserved and continued against it in the hands of the purchaser, or shall be transferred, with the same priority and preference in every respect as it existed against the property, to the fund arising from the sale. It was this protection of their rights that appellant sought in the court below. If their rights are of such character that they can be enforced against the funds arising from the sale of the canal property, now in the hands of the receiver appointed by the court, as we have attempted to show that they are in the first part of this brief, they ask that they may be so enforced. If they are not of that character, but are of the character which adhere to the property in the hands of the purchasers, as they must be if they can not be enforced against the fund, then they desire that they be protected there.

But what they do most solemly protest against is that this claim, for the payment of which they have patiently waited for now nearly forty years, shall not be summarily wiped out, and forever utterly extinguished, under the forms of judicial proceedings, and in the name of the administration of justice, without their having an opportunity to be heard.

We respectfully submit the following recapitulation of our views in this case:

First. The act of January 20, 1842, authorizing the agent of the State to make the contract and providing an explicit and exclusive means of payment out of rents, to be derived from the property created as the result of the

improvement contracted for, was an express perpetual grant of those rents to the satisfaction of the indebtedness of the State to the parties who should do the proposed work until that indebtedness should be paid.

Second. The passage of this act, the contract with Spears & Case pursuant to it, and their work done under the contract having all occurred while the canal and water-power were the property of the State, the rights of the parties as established by this legislation and contract became fixed, and any subsequent conveyance of the canal and water power under the legislation authorizing it could not affect those rights.

Third. When the State conveyed the canal to the trustees pursuant to the Butler bill it did so subject to all existing rights, equities and liabilities against the State in relation thereto and the rights of appellants so far from being prejudiced by this transfer were expressly protected in it.

Fourth. The trustees only received such title as the State chose by and pursuant to this legislation to convey, and subject to all the claims, rights and equities that the State imposed upon the property conveyed.

Fifth. These trustees could not transfer to another any greater right than they received from the State, nor could they transfer the property relieved from any claim, right or equity existing against it at the time they took it from the State.

Sixth. When they were brought into court by the complainant Gapen, by the original bill, they brought with them the property which was the subject of the trust with which they were charged in the precise condition, so far as the rights of appellants were concerned, as when they received it from the State.

Seventh. These appellants not having been made parties to the record by bill or cross-bill, can be in no way affected by the decrees rendered in the case.

Eighth. At the time of filing their intervening petition, appellants stood in a position to assert whatever rights Spears & Case possessed under their contract with the State, unprejudiced and unaffected by any subsequent legislation or judicial action.

Ninth. At the time appellants' intervening petition was filed, the proceedings in the original cause were still so far *in fieri* that appellants' rights could be fully determined and protected, either out of the fund under the control of the court, or by declaring appellants' rights against the purchasers of the canal property without prejudice to the rights of any other party to this suit.

Tenth. If appellants have any rights at all under the contract of Spears & Case, which are in danger of being infringed, either by the proceedings in the original suit, or by the purchasers under the decree therein, they may and must seek redress by intervening petition.

Eleventh. The spirit of a court of equity is to avoid multiplicity of suits and circinty of action, and to administer

complete relief in a single suit to all parties concerned in the subject of the litigation where it can be done, and to do this all such parties have a right to and must be brought before it.

Twelfth. Either the proceedings resulting in the sale of the canal to which appellants were not parties, have wiped out and annihilated all their rights to compensation for work done under the contract pursuant to the Act of 1842, or they have still an existing right thereto.

Thirteenth. If they have a right to compensation, they have the means of enforcing that right so long as the water-power, out of the rents of which that compensation was to be paid, is in existence; if that is to be treated as sold free from the claims of appellants, so long as the fund is in the hands of the court, enhansed as it must be presumed to have been to the extent of the value of the water-power.

Fourteenth. The question whether the purchasers of the canal under the decre in the original decree, can be compelled to keep up the canal and water-power so as to produce a water-power sufficient to pay rent, was not before the court below, inasmuch as appellants intervening petition shows that the water-power is in fact there, and in part under lease, which will not expire until 1882, from which rents are actually being received, which allegations are by the demurrers admitted to be true.

Fifteenth. If the court had the power to order the sale of the canal to satisfy the claims of the holders of the certificates of stock, and such holders had the right to receive

the proceeds of such sale toward such satisfaction, upon precisely the same principles, appellants, holding a prior grant of the profits of the Delphi water-power for the payment of their claims, have a right to be first paid out of the proceeds of the sale to the amount that the value of the water-power bears to the whole value of the canal.

SHELLABARGER & WILSON,
HILL & NICHOL,

For Appellants.